A **SIN CHUAN AIK BROTHERS REALTY SDN BHD**

v.

INTI HIGHER LEARNING CENTRE SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-22-03-1993]
22 JANUARY 2008

C ***LAND LAW:*** *Tenancy agreement - Termination of - Plaintiff's claim for costs and damages against defendant - Whether in light of power of attorney plaintiff could bring action in its name - Whether writ action should have been filed under registered owners of property - Whether plaintiff as agent has locus standi - Whether landlord tenant relationship* D *existed between registered owner and defendant - Whether defendant could sue for counterclaim against plaintiff*

CIVIL PROCEDURE: *Preliminary objection - Res judicata - Whether issue raised was res judicata - Previous judge gave no reasons for* E *dismissing issue raised and had ordered case to proceed to trial - Whether present court inclined to accept plaintiff's argument that ruling of previous judge was res judicata vis a vis the issue now raised by the defendant*

The plaintiff was a company duly appointed as an agent by the registered proprietors of a building known as Wisma SCA to rent F out, collect rent and manage the said buiding. The defendant was a private educational institution running a private college. On 12 February 1988 the plaintiff issued a letter of offer setting out the terms of which the plaintiff was willing to rent out the second floor of Wisma SCA. On 1 April 1988, the defendant moved into G the second floor of Wisma SCA but at that stage the formal tenancy agreement was yet to be finalized. While parties were still in the midst of negotiating to arrive at an agreed formula for determining the monthly commission rental, the plaintiff on 19 August 1989, wrote to the defendant offering the renting of the H third floor in the terms as set out in the letter. The defendant accepted the offer and on 1 November 1989, the defendant occupied the third floor of Wisma SCA. But the parties were yet to arrive at an agreed formula on the computation of the monthly commission rental. On 23 February 1990, the plaintiff wrote to I the defendant setting out the terms of offer for the rental of the third floor. Then on 24 April 1990 the defendant's solicitors wrote

to the plaintiff's solicitors asking whether the plaintiff intended to continue with the tenancy. There was no response from the plaintiff. Finally on 16 March 1991, the defendant served a notice to the plaintiff terminating the renting of Wisma SCA and on 15 April 1991 the defendant vacated the premises. In this writ action, the plaintiff claimed against the defendant for an alleged breach of a tenancy agreement between the parties for the rental of the second and third floors of Wisma SCA. The plaintiff took the position that although the parties never entered into a formal tenancy agreement, nevertheless, there existed a written tenancy agreement between the plaintiff and the defendant. The plaintiff thus claimed for (a) an account of the gross monthly revenue; (b) for damage to the fixtures and fittings; (c) for cost of reinstatement of the premises; (d) for full rental for the whole month of April 1991 and (e) for loss of income by inability to rent out the premises. The defendant had a counter claim against the plaintiff for a sum of RM57,000 as a return of the deposit paid. The basis of the counter claim was that the defendant did not breach the agreement it had with the plaintiff and was therefore entitled to the return of the deposit. The issue that arose was whether in the light of the power of attorney the plaintiff could bring this action in its name instead of in the name of the registered owners. The plaintiff's counsel, however, argued that this issue was now *res judicata* because the issue had already been raised by the defendant's counsel as a preliminary objection before a previous judge. It was raised before the trial commenced, and the learned judge, after hearing submissions, had dismissed the preliminary objection and had ordered the case to proceed to trial. However, before the trial date, the said learned judge had transferred to another court.

Held (dismissing plaintiff's claim and defendant's counter claim):

(1) The registered proprietors of Wisma SCA were the following five individuals, Low Kok Tin, Low Kok Tee, Low Kok Tuan, Low Kok Yau and Low Kok Loon. These registered owners granted the plaintiff a power of attorney which does not empower the plaintiff to commence this action in its own name. The writ action should have been filed under the name of the five registered owners. Hence, the plaintiff had no *locus standi* and the writ action must be dismissed. (para 16)

(2) Since several procedural issues were raised before the previous learned judge and he, in dismissing the preliminary objection, did not give his reason, this court therefore was not inclined to accept the argument of the plaintiff that the ruling of the previous judge was now *res judicata vis a vis* the issue that was now raised by the defendant. (para 22)

(3) The plaintiff was negotiating with the defendant not in their own right as the purported owner and the prospective landlord of Wisma SCA but as the agent or attorney of the registered owners. It was significant to note that the draft tenancy agreement stated that the tenancy agreement was between the five registered owners (instead of the plaintiff) and the defendant. This was strong evidence to show that the plaintiff did not have in mind to be the landlord in the proposed tenancy. The plaintiff was constantly conscious of the existence of the power of attorney, and indeed, had even exhibited the power of attorney as evidence at the trial. Since the defendant had taken the position that in law the landlord-tenant relationship existed only between the registered owner (not the plaintiff) and the defendant, therefore, consistent with this position taken the defendant must sue the registered owners (and not the plaintiff) for the return of the deposit. (paras 23 & 25)

Case(s) referred to:

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

J Selvam & Anor v. S Mehta & Anor [1980] 1 LNS 149 ***(refd)***

For the plaintiff - Balwinder Singh; M/s Kumar Partnership
For the defendant - Gopal Sreenevasan; M/s Sivananthan

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Yunus J:

[1] This case was originally heard before Hashim Yusof J (as he then was). At the commencement of the hearing, before the trial could proceed the defence raised a preliminary objection. After hearing submissions, the learned judge dismissed the preliminary objection and ordered the case to proceed to trial.

[2] The case then was adjourned to another date for the trial. However, before the trial date, Hashim Yusof J was transferred to another court. When I subsequently took over conduct of this case on 24 December 2003, it was agreed by parties that I should hear this case *de novo*.

[3] The plaintiff in the present case is a company duly appointed as an agent by the registered proprietors of a building known as 'Wisma SCA' to rent out, collect rent and manage the said building.

[4] The defendant is a private educational institution running a private college at Wisma Sim Lim in or about early 1988, and was considering alternative premises for its private college.

[5] The defendant intimated to the plaintiff that it was interested to rent Wisma SCA to be used as its private college. There was a meeting between the representatives of both sides. On 12 February 1988 the plaintiff issued a letter of offer setting out the terms of which the plaintiff was willing to rent out the 2nd floor of Wisma SCA. On 1 April 1988 the defendant moved in into the 2nd floor of Wisma SCA. But at that stage the formal tenancy agreement was yet to be finalized. However, in principle parties were in agreement that the monthly rentals were to comprise of two elements (or components), namely:

(1) the basic rental; and

(2) the commission rental.

[6] The parties were in agreement as to the amount of the monthly basic rental. The parties also were able to agree that the monthly commission rental was to be linked to the gross monthly revenue of the defendant. But parties found it difficult to agree on the formula to be used to compute the monthly commission rental. So the parties carried out negotiations to work out a formula that would be acceptable to both sides. On 27 June 1989 (do note that this is more than a year after the defendant had occupied the 2nd floor of Wisma SCA) the plaintiff forwarded a copy of the draft tenancy agreement to the defendant. On 22 September 1989 the defendant's solicitors returned the draft tenancy agreement to the plaintiff with amendments. While parties were still in the midst of negotiating to arrive at an agreed formula for determining the monthly commission rental, the plaintiff, on 19 August 1989 wrote

A to the defendant offering the renting of the 3rd floor in the terms as set out in the letter. The defendant accepted the offer and on 1 November 1989, the defendant occupied the 3rd floor of Wisma SCA. But the parties were yet to arrive at an agreed formula on the computation of the monthly commission rental. On
B 23 February 1990 the plaintiff wrote to the defendant setting out the terms of offer for the rental of the 3rd floor. Then on 24 April 1990 the defendant's solicitors wrote to the plaintiff's solicitors asking whether the plaintiff intended to continue with the tenancy. There was no response from the plaintiff. So on 16 July 1990 the
C defendant's solicitors wrote to the plaintiff's solicitors asking whether the plaintiff intends to execute the tenancy agreement. Again there was no response. Finally on 16 March 1991 the defendant served a notice to the plaintiff terminating the renting of Wisma SCA with effect from 15 April 1991. On 15 April 1991
D the defendant vacated the premises.

[7] In this writ action, the plaintiff claims against the defendant for an alleged breach of a tenancy agreement between the parties for the rental of the 2nd and 3rd floors of Wisma SCA. The
E plaintiff, in the present case, takes the position that although the parties never entered into a formal tenancy agreement, nevertheless, there exists a written tenancy agreement between the plaintiff and the defendant. From the plaintiff's standpoint, the tenancy was for a period of one year from 1 April 1990 until
F 31 March 1991. The tenancy agreement, the plaintiff alleges, was constituted by three letters which the plaintiff wrote to the defendant, namely, the letters dated 12 February 1988, 19 August 1989 and 23 February 1990. I have already alluded to these letters earlier in this judgment.

G **[8]** The plaintiff is claiming:

(a) for an account of the gross monthly revenue;

(b) for damage to the fixtures and fittings;

H (c) for cost of reinstatement of the premises;

(d) for full rental for the whole month of April 1991; and

(e) for loss of income by inability to rent out the premises.

I

[9] The defendant has a counter-claim against the plaintiff for a sum of RM57,000 as a return of the deposit paid. The basis of the counter-claim is that the defendant did not breach the agreement it had with the plaintiff and is therefore entitled to the return of the deposit.

[10] I have dismissed the plaintiff's claim with costs. I have also dismissed the defendant's counter-claim with costs.

[11] I shall now explain my grounds.

The plaintiff's Claim

[12] The defendant in their defence raises several issues. But I propose to deal only with one issue: whether in the light of the power of attorney the plaintiff can bring this action in its name instead of in the name of the registered owners. I have dismissed the plaintiff's claim solely on this ground.

[13] The registered proprietors of Wisma SCA are the following five individuals:

(1) Low Kok Tin;

(2) Low Kok Tee;

(3) Low Kok Tuan;

(4) Low Kok Yau; and

(5) Low Kok Loon.

[14] These five registered owners granted the plaintiff a power of attorney dated 5 May 1984. The relevant provisions of the power of attorney are the following:

> 15.1 to sign, deliver and execute unto the tenant their successors in title, personal representatives and assign a good valid and effectual tenancy agreement of the portions or parcels of the Complex (Wisma SCA) lot to the said tenants with such terms covenants and conditions as are set out in the tenancy agreement.
>
> 15.2 to demand and receive from the said tenants or their successors in title, personal representatives and assigns all sums due and payable by the said tenants and to give a good receipt for the same.

[15] In my judgment, this power of attorney does not empower the plaintiff to commence this action in its own name. In fact this is admitted by the plaintiff itself; for, their main witness, Encik Low Twan Kin (PW1), a director of the plaintiff company, in cross-examination, conceded:

> Q: Would you agree that the power of attorney does not give the plaintiff the power to file any suit with regards to the tenancy in the plaintiff's name?
>
> A: No, it does not.

[16] Since it is admitted – and I would say correctly – by PW1 that the plaintiff has no power under the power of attorney to file the present writ action under its own name, this means the writ action should have been filed under the name of the five registered owners. Since in the present case the plaintiff has filed the writ action under its name, therefore, it has done something which it is not empowered to do so under the PA. Hence, it has no *locus standi* and the writ action must be dismissed with costs.

[17] The learned counsel for the plaintiff, Encik Balwinder Singh, in his written submission, however, argues that this issue is now *res judicata* because the issue had already been raised by the defendant's counsel as a preliminary objection before Hashim Yusof J when this case was first heard before the learned judge on 21 October 1998. It was raised before the trial commenced, and the learned judge, after hearing submissions, had dismissed the preliminary objection. The learned counsel refers to *Hartecon JV Sdn Bhd v. Hartela Contractors Ltd* [1997] 2 CLJ 104 where the Court of Appeal held that where once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened.

[18] The issue raised in the preliminary objection before Hashim Yusof J then was this:

> Can person who is not a registered proprietor of premises – let out or take action?

[19] After hearing submissions Hashim Yusof J dismissed the preliminary objection and directed the trial to proceed. This is what the learned judge said:

> Setelah mendengar hujahan kedua-dua belah pihak Mahkamah menolak bantahan awal Peguam Defendan dengan kos dalam kausa. Kes perlu diteruskan perbicaraan.

[20] It will be observed that the learned judge in dismissing the preliminary objection did not give any grounds. The learned judge did not explain whether his decision was based on substantive law arguments or whether it was based on procedural law arguments. It is important to observe from the notes of the proceedings before Hashim Yusof J that, besides issues of substantive law, issues of procedural law were also raised by the learned counsel for the plaintiff in opposing the preliminary objection of the defence then. For example, it was submitted by the counsel for the plaintiff then that the preliminary objection should have been raised by way of an O. 18 r. 19 application; that the defendant was late in raising the preliminary objection; that the defence should have asked for further and better particulars. It was also argued by the counsel for the plaintiff in opposing the preliminary objection before Hashim Yusof J – and this, to my mind, is a very pertinent observation for the purpose of the issue of *res judicata* - that the defendant:

> Should go for trial and establish the facts first.

[21] Since the learned judge did not give his ground (or grounds) for dismissing the preliminary objection, we do not know why he had dismissed the same. He might very well have been persuaded by any one (or more) of the above procedural law arguments by counsel. For example, the learned judge could have been persuaded by the argument that the defence '[s]hould go for trial and establish the facts first'. On the hypothesis that this was the basis for the learned judge's rejection of the preliminary objection, it is now perfectly in order (and, indeed, would be consistent with the learned judge's ruling and direction) for the defence to raise the same issue again, now that the trial had concluded and the full facts of the case have been established. Although notwithstanding the fact that the learned judge, after dismissing the preliminary objection, did immediately say:

> Kes perlu diteruskan perbicaraan.

it is, to my mind, still speculative on my part to say that the acceptance of the 'go for trial first' argument was the reason for his rejection of the preliminary objection, yet at the same time, it would also be speculative on my part to rule out the possibility of the learned judge accepting this ('go for trial first') argument as his basis for dismissing the preliminary objection.

[22] Since several procedural issues were raised before the learned judge and he, in dismissing the preliminary objection, did not give his reason, I am, therefore, not inclined to accept the argument of Encik Balwinder that the ruling of Hashim Yusof J is now *res judicata vis-a-vis* the issue that is now raised by Encik Gopal Sreenevasan, the learned counsel for the defendant.

[23] Now, Encik Balwinder also submits in the alternative that the plaintiff can legally file the writ in its name because, counsel contends, it is the plaintiff who had tenanted out the premises to the defendant – not the five registered owners. He submits that, in law, the landlord need not necessarily be the registered owner, citing *J. Selvam & Anor v. S Mehta & Anor* [1980] 1 LNS 149. I accept that in law the landlord need not have to be the registered proprietor and that in the present case legally the plaintiff can be the landlord in respect of the tenancy of the premises. And if the plaintiff was the landlord of the tenancy with the defendant (as opposed to merely being the agent of the registered owners of Wisma SCA) then, of course, the plaintiff has the right to bring this action in their own name (instead of in the name of the five registered proprietors). However, in the present case, was the plaintiff the landlord in the tenancy with the defendant? When the plaintiff negotiated with the defendant, were they negotiating in their own right; or were they negotiating as the agent or attorney of the registered proprietors? On the evidence it would appear to me that the plaintiff was negotiating with the defendant not in their own right as the purported owner and the prospective landlord of Wisma SCA but as the agent or attorney of the registered owners. It is significant to note that the draft tenancy agreement that the plaintiff forwarded to the defendant *vide* their letter dated 27 June 1989 (B at pp. 38-60) states that the tenancy agreement was between the five registered owners (instead of the plaintiff) and the defendant. This is a strong evidence to show that the plaintiff did not have in mind to be the landlord in the proposed tenancy. The plaintiff was constantly conscious of the existence of the power of attorney and, indeed, had even exhibited the power attorney as evidence at the trial.

[24] As I have dismissed the plaintiff's claim on this ground, I do not think that it is necessary for me to touch on the other issues raised by the defence.

The Defendant's Counter-Claim

[25] In the light of the ground for my dismissing the plaintiff's claim, the defendant's counter-claim has became untenable and must necessarily be also dismissed. Since the defendant has taken the position that in law the landlord-tenant relationship existed only between the registered owner (not the plaintiff) and the defendant, therefore, consistent with this position taken the defendant must sue the registered owners (and not the plaintiff) for the return of the deposit.

[Plaintiff's claim dismissed with costs; defendant's counter-claim dismissed with costs.]